Supreme Court, U. S.
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NO. 80-821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARLIN W. JOHNSTON, et al.,

Petitioners

VS.

DELFINO SILVA, et al.,

Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Respondents feel it is appropriate to restate the questions presented by Petitioners as follows:

1. Did the district court have jurisdiction over this action under 28 U.S.C. §1343(3) and the substantial constitutional question test of Hagans v. Lavine, 415 U.S. 528 (1974).

2. Did the federal court below properly grant notice relief to class members injured by a state regulation once the state modified the regulation during litigation thus mooting part of the claim.

3. Were the facts supporting the federal statutory challenges to the State AFDC disability regulations sufficiently related to the facts surrounding the constitutional challenges to the same regulations to support the exercise of pendent jurisdiction over the statutory claims.

4. Does the Eleventh Amendment preclude an order of class notice where the State objects to the expense but fails to present an adequate factual basis for their objection and where the notice is almost identical to the class notice approved in Quern v. Jordan, 440 U.S. 332 (1979).

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The Respondents, Delfino Silva and Jose Miranda, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 621 F.2d 640, sub. nom. Silva v. Vowell.

STATUTES INVOLVED

28 U.S.C. §1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by by law to be commenced by any person:
>
> . . .
>
> (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. §1331. Federal Question (1980):

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

STATEMENT OF THE CASE

The Respondents add the following to the Petitioners' statement of the case:

Respondents' original complaint alleged jurisdiction under 28 U.S.C. §1331, (federal question) as well as 28 U.S.C. §1343.

The district court granted partial summary judgment to Respondents in December, 1978 but Petitioners did not raise challenges to jurisdiction and to the class issues until April 26, 1979. All parties eventually approved the class description and notice in June of 1979 and the class notice has been issued.

Respondents also refer the Court to the "History of the Litigation" Appendix to Judge Tate's opinion in the Fifth Circuit below.

This Appendix is at pages A-28 through A-31 of Petitioners Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

It is unnecessary for the Supreme Court to consider the jurisdiction questions presented in this case. The question of the substantiality of a constitutional claim sufficient to invoke jurisdiction under 28 U.S.C. §1343(3) has become unimportant in federal question cases as a result of the recent removal by Congress of the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331. P.L. 96-486, December 1, 1980.

Respondents alleged in their original complaint, jurisdiction under 28 U.S.C. §1331. The federal courts now have jurisdiction in this case under 28 U.S.C. §1331 due to the federal questions raised. The expanded availability of §1331 jurisdiction makes it improbable that the substantial constitutional claim issue will be present in future cases involving federal questions.

The courts below found the Respondents had alleged in their original complaint a substantial constitutional claim sufficient to support the district court's exercise

of pendent jurisdiction over the related statutory attack on the State AFDC disability requirements. The lower courts fully considered and correctly applied the test of Hagans v. Lavine, 415 U.S. 528 (1974) to reach this conclusion. See also Rosado v. Wyman, 397 U.S.397 (1970). The rulings below do not conflict in any way with the Hagans test. To counsel's knowledge there is no dispute among the circuit courts in the application of this test. See e.g. Herweg v. Ray, 619 F.2d 1265, 1269 (8th Cir. 1980), Curtis v. Taylor, 625 F.2d 645, 649 (5th Cir. 1980), Shands v. Tull, 602 F.2d 1156, 1158 (3rd Cir. 1979), Doe v. Klein, 599 F.2d 338, 340 (9th Cir. 1979), Louise B. v.Coluatti, 606 F.2d 393, 400 (3rd Cir. 1979).

The Petitioners rely on Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) to support their argument that the federal courts cannot assume jurisdiction in this case. However, Chapman must be distinguished from this case and Hagans because in Chapman there was no constitutional claim at all.

Petitioners' equal protection claim in this case alleges that the Texas AFDC disability standard unreasonably created two classes of needy children of disabled parents; (a) needy children of totally incapacitated parents and (b) needy children of parents who, though not totally incapacitated, were, due to their incapacity, incapable of providing even minimal support to their children. The state granted benefits to the first class and denied benefits to the second.

In Hagans, the Supreme Court considered almost the exact jurisdiction question presented in this case. In Hagans, a New York AFDC regulation was in question. Following the Hagans test, the court below stated:

> In light of the Hagans test, we are convinced that the plaintiffs' Equal Protection claim in their original complaint was a substantial constitutional claim sufficient to support the district court's exercise of pendent jurisdiction over the related statutory attack on the disability reuirements. Texas's decision to deny AFDC benefits to needy children whose fathers' partial incapacity prevented them from obtaining an income sufficient to support their children, despite their being "capable of light work," is unquestionably not "so patently rational as to require no meaningful consideration." Hagans v. Lavine, 415 U.S. at 541, 94 S.Ct. at 1381. We therefore hold that the plaintiffs' original complaint presented a substantial constitutional question for purposes of permitting consideration by the federal district court of related pendent claims. See e.g., Hagans v. Lavine, supra; Rosado v. Wyman , 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

Petitioners' argument that Respondents did not allege a substanital constitutional claim is without merit. Both courts below fully considered Petitioners' arguments after extensive oral argument and briefing and ruled against Petitioners on this point. Petitioners do not even discuss the Hagans test in their argument and imply that the courts below failed to inquire into the substantiality of the Respondents' claims. The lower court opinions belie this argument. The present

case is similar to numerous other welfare cases which raise both constinutional and federal statutory claims. e.g. Dandridge v. Williams, 397 U.S. 471 (1970); Townshend v. Swank, 404 U.S. 282 (1971); Hagans v. Lavine, supra.; Rosado v. Wyman, supra.

The jurisdiction issue raised in this case is also unimportant because the Respondents' constitutional and statutory claims were based upon unique Texas AFDC disability regulations which are no longer in existence. Therefore the due process and equal protection challenges raised in this case do not apply to any other present or future litigants and will not foreseeably recur. It is therefore unnecessary for the Court to review the jurisdiction question which was correctly decided below.

The Petitioners did not raise their jurisdictional objections until three and one-half years after the litigation was started and four months after the trial court granted partial summary judgment for the Respondents. Because of this the record below is obscure and it is unwise for the Court to use this record for consideration of the jurisdiction questions.

II.

This Court should not review the Petitioners' claim that class notice relief should not have been granted because the class notice has already been sent to the class members. Also, the nature of the class in this case and the mootness issue were unique to the Texas AFDC regulations which have now been repealed by the State. Therefore, the Petitioners' claim is no longer a live issue and consideration of the argument would be meaningless.

The Petitioners did not challenge the class issue until three and one-half years after the case was filed. In addition, the Petitioners approved the class description and notice which was ordered by the district court. Petitioners have therefore waived their right to raise objections to this class notice relief.

Petitioners' claim that the class notice relief was based on a moot issue is without merit and the cases cited by Petitioners, e.g. Flast v. Cohen, 392 U.S 83 (1968) and Sosna v. Iowa, 419 U.S 393 (1975) do not apply to the facts in this case. In the present case there were still live issues to be resolved by the Court. The majority panel below correctly noted that "[t]he Plaintiffs' claim for a notice to the class was not mooted by the revision of the regulations, any more than a claim for pre-revision damages would have been." The Court further stated that "[g]iven the facts of this case and the intertwined nature of the facets of the challenged standard, . . . the Plantiffs' suit presented a 'case or controversy' within the meaning of Article III."

Thus, unlike the situation in Sosna and Flast there were still live issues and a real "case or controversy" which warranted relief by the court. The cases relied upon by the Petitioners are, therefore, distinguishable from the present case. The class notice relief ordered by the court is almost identical to that approved in Quern v. Jordan, 440 U.S. 332 (1979).

Petitioners' third question presented to this Court argues that the district court should not have exercised pendent jurisdiction over Respondents' statutory claims. This issue was resolved by the recent removal of the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331.

Respondents' original complaint alleges 28 U.S.C. §1331 as an alternative jurisdictional basis for this case and jurisdiction can be assumed thereunder. The federal courts no longer need to exercise pendent jurisdiction over federal questions covered by 28 U.S.C. §1331. Petitioners' pendent jurisdiction question is no longer important and it would be meaningless for the Court to review this issue.

The lower courts fully considered and correctly applied the standards of Rosado v. Wyman, 397 U.S. 397 (1970) and United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) and ruled that Respondents' constitutional and federal question claims derived from the same "common nucleus of operative fact". Petitioners' claims that the constitutional and statutory challenges were unrelated are without merit. As the majority panel stated:

> The constitutional claims relating to the invalidity of the light work requirement and to the invalidity of the sixty-day duration requirement as a basis for denying or terminating AFDC benefits, and the statutory claims (based on the Supremacy Clause) relating to the invalidity of these same two facets were (to mix a metaphor) four intertwined strands of the same ball of wax.

The exercise of pendent jurisdiction by the courts below was based on facts and state regulations which are unique to this case. In addition, the state regulations were repealed. Thus, this issue is not of national importance and the decision below applies only to the facts at hand.

IV.

The Petitioners' fourth claim does not warrant review because the issue was mooted when the court-ordered class notice was sent to the class by Petitioners in the summer of 1980.

Petitioners' objection to the cost of sending the class notice is without merit because the notice ordered by the court below is almost identical to the notice ordered in the recent Supreme Court case of Quern v. Jordon, 440 U.S. 332 (1979). Also, the opinion below correctly followed law established in the recent Supreme Court cases of Hutto v. Finney, 437 U.S. 678 (1978) and Milliken v. Bradley, 433 U.S. 267 (1977) to support their decision. Counsel is not aware of any conflicting decisions in the circuits on the class notice issue.

Petitioners' objection to the cost of sending notice was never supported by a factual presentation in the record and no effort was made by the Petitioners to show that the cost of the notice would, in the words of Hutto, interfere with the "State's budgeting process." Thus, the lower courts' order correctly follows recent Supreme Court pronouncements on this issue. Judge Tate, in his opinion below, stated further:

> The defendants have contested this litigation at every stage over the past five years without ever raising any substantive defense to the plaintiffs' contention that the disability standard is both unconstitutional and inconsistent with federal law. We find no merit to their contentions that the Eleventh Amendment protects them from paying for an explanatory notice to the class or that the administrative costs of preparing and mailing such a notice outweigh the possible benefits to the class.

Review of this issue by the Supreme Court would be meaningless because the class notice has already been sent and the State regulations complained of have been repealed.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald A. Garcia, do hereby certify that 3 true and correct copies of the foregoing Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been sent to Mark White, Attorney General of Texas; David H. Young, Assistant Attorney General; and Kathryn A. Reed, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711 by United States Postal Service, Certified, Return Receipt Requested, this 23rd day of December, 1980.

G. A. García

GERALD A. GARCIA